

Nos. A10-1242, A10-1243, A10-1246 and A10-1247

State of Minnesota
In Supreme Court

Rick Glorvigen, as Trustee for the Next-of-Kin of
decedent James Kosak,
Appellant/Cross-Respondent (A10-1242, A10-1246),
and

Thomas M. Gartland, as Trustee for the Next-of-Kin of
decedent Gary R. Prokop,
Appellant/Cross-Respondent (A10-1243, A10-1247),
vs.

Cirrus Design Corporation,
Respondent (A10-1246, A10-1247),

Estate of Gary Prokop, by and through Katherine Prokop
as Personal Representative,
Appellant/Cross-Respondent (A10-1242, A10-1246),
and

University of North Dakota Aerospace Foundation,
Respondent/Cross-Appellant (A10-1242, A10-1243).

**UNIVERSITY OF NORTH DAKOTA AEROSPACE FOUNDATION'S
PRINCIPAL AND RESPONSE BRIEF AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

- 1. Does a flight instructor have a common-law duty, consistent with public policy and the educational malpractice doctrine, to ensure a pilot's competency such that the instructor can be liable for personal injuries that occur long after instruction has been completed?**

The Court of Appeals applied the educational malpractice doctrine to hold Minnesota law imposed no duty on flight instructor University of North Dakota Aerospace Foundation ("UNDAF") for injuries that occurred after training.

Larson v. Independent School District No. 314, 289 N.W.2d 112 (Minn. 1979).
Lange v. Nelson-Ryan Flight Service, Inc., 259 Minn. 460, 108 N.W.2d 428 (1961).
Page v. Klein Tools, Inc., 610 N.W.2d 900 (Mich. 2000).

- 2. May Plaintiffs now assert on appeal that product-liability "duty to warn" and "duty to instruct" claims fall outside the educational malpractice bar where they did not litigate such claims below?**

The Court of Appeals did not reach the issue, characterizing Plaintiffs' substantive product-liability arguments as unprecedented and unsupported.

Gray v. Badger Mining Corp., 676 N.W.2d 268 (Minn. 2004).
Hauenstein v. Loctite Corp., 347 N.W.2d 272 (Minn. 1984).

- 3. Did Plaintiffs provide competent, legally sufficient evidence to support their claims that training-related negligence caused the crash?**

The Court of Appeals did not reach the issue; this Court granted UNDAF's request for cross-review.

Langeslag v. KYMN Inc., 664 N.W.2d 860 (Minn. 2003).
Gerster v. Wedin, 294 Minn. 155, 199 N.W.2d 633 (1972).

- 4. May Plaintiffs have judgment in their favor against an intervenor whom they never sued, even though the intervenor only entered the case (1) to protect against indemnity liability and (2) after the statute of limitations had expired?**

The Court of Appeals did not reach the issue; this Court granted UNDAF's request for cross-review.

Miller v. Astleford Equip. Co., 332 N.W.2d 653 (Minn. 1983).
City of Willmar v. Short-Elliott-Hendrickson, Inc., 512 N.W.2d 872 (Minn. 1994).

STATEMENT OF THE CASE

This case alleged negligent flight instruction, not breach of a “duty to warn” or “duty to instruct.” The jury was instructed only on general negligence. Plaintiffs never submitted product-liability duty-to-warn jury instructions. Yet product-liability law is cited now, in an attempt by Appellants and their *amici curiae* to evade the legal bar of the educational malpractice doctrine, its universally recognized public policies, and a federal district court’s dismissal of strict liability and product-liability warranty claims from which no appeal was taken.

The case arose from the January 18, 2003 crash of a Cirrus Design Corporation (“Cirrus”) SR-22 airplane near Hill City, Minnesota. The pilot, Gary R. Prokop, and his passenger, James Kosak, died in the crash. In 2005, their wrongful death trustees commenced actions—*against Respondent Cirrus only*—in Itasca County District Court (Appellant Thomas Gartland on behalf of Prokop, and Appellant Rick Glorvigen on behalf of Kosak). (A1-11.)¹

Plaintiffs concede they never sued Respondent/Cross-Appellant University of North Dakota Aerospace Foundation (“UNDAF”). (Gartland Br. 27; Glorvigen Br. 36.) In fact, UNDAF intervened only after Cirrus tendered defense and indemnity to UNDAF, years after the statute of limitations had expired on any claim Plaintiffs might have asserted against UNDAF. (A70-74; UNDAF Add. 1-13.)

¹ Appellants’ Joint Appendix will be cited as “A __,” Gartland’s Addendum as “Gartland Add. __,” UNDAF’s Addendum as “UNDAF Add. __,” and Trial Transcript as “Tr. __.”

Plaintiffs alleged Cirrus was negligent for failing to provide Prokop adequate “flight training,” “flight instruction,” and/or “pilot training.” The Complaints identified one flight lesson (“IFR Flight (Non-Rated)”) that was allegedly not completed, and also alleged Cirrus was negligent for not providing “scenario-based” instruction. (A6, 10.)

Cirrus removed the actions to United States District Court on federal preemption grounds. On January 18, 2006, while Plaintiffs’ motions to remand were pending, the three-year statute of limitations on wrongful-death claims expired. Minn. Stat. § 573.02, subd. 1.

On February 16, 2006, United States District Judge Paul A. Magnuson granted Plaintiffs’ motions to remand to state court. (A43.)

The matter was again removed to federal court. Almost two years later, on February 11, 2008 Judge Magnuson granted summary judgment in favor of Cirrus on Gartland’s claims for strict liability and breach of express and implied warranties. (A50-64.) The federal court also denied summary judgment for Cirrus on educational malpractice grounds, reasoning “Cirrus’ primary business is building and selling airplanes, not training pilots.” (A57.)

On February 19, 2008, Cirrus tendered defense and indemnity pursuant to a Cirrus-UNDAF Customer Training agreement. (UNDAF Add. 1-13.)

On September 11, 2008, after the matter was again remanded, UNDAF filed a Notice of Intervention as Defendant, asserting a right to file a cross-claim seeking judicial determination regarding “indemnity liability” for claims Plaintiffs made against Cirrus,

and “[i]f necessary, to control the strategy of and to present its own defense.”² (A70-74.) After no party objected to the intervention, the Honorable Jon A. Maturi granted the intervention and Cirrus and UNDAF served indemnity cross-claims. (A88-97.)

The actions were tried together, the Honorable David J. Ten Eyck presiding by designation. Plaintiffs never asserted claims against UNDAF; at trial, they confirmed they were asserting claims only against Cirrus, not against UNDAF. (Pre-Trial Tr. of Apr. 20, 2009 107:5-8; Trial Tr. 1717:2-3.)

UNDAF and Cirrus moved for judgment as a matter of law (“JMOL”) on grounds including that defendants owed no legal duty because the negligence claims were barred by the “educational malpractice” doctrine of *Alsides v. Brown Institute*, 592 N.W.2d 468 (Minn. Ct. App. 1999). The court denied the motions.

The jury returned a verdict finding Prokop 25% negligent and Cirrus and UNDAF each 37.5% negligent. (Gartland Add. 49-50.)

Post-trial, UNDAF moved for JMOL based on lack of duty and lack of competent evidence on causation, and on the ground UNDAF could not be liable to Plaintiffs who never sued UNDAF. (A131-32.)

On May 20, 2010, the district court denied UNDAF’s motions and ordered judgment entered pursuant to Minn. Stat. § 604.02 (2002) against Cirrus and UNDAF jointly and severally for \$7.4 million in favor of Glorvigen, and \$9 million in favor of Gartland. (Gartland Add. 40-135.) With indemnity cross-claims pending, the district

² UNDAF did not intervene “as Cirrus’ contractual agent” as the *amicus curiae* brief of the Minnesota Attorney General contends. (AG Br. 5.)

court found no just reason for delay of entry of judgment pursuant to Minn. R. Civ. P. 54.02. (Gartland Add. 134-35.)

This appeal followed. Cirrus and UNDAF argued the district court erred (1) by not barring the claims pursuant to the educational malpractice doctrine and (2) by denying JMOL regarding lack of legally sufficient proof on causation. UNDAF also argued Plaintiffs could not take judgment against it because Plaintiffs never sued UNDAF. Plaintiffs contended the case alleged product-liability claims to which the educational malpractice doctrine could not apply.

On April 19, 2011, a divided Court of Appeals panel reversed the judgment and remanded for entry of judgment in favor of Cirrus and UNDAF. (Gartland Add. 1-39.) The majority did not reach the procedural argument that Plaintiffs never pleaded or tried a product-liability case; instead, it rejected the product-liability theory on the merits. *Glorigen v. Cirrus Design Corp.*, 796 N.W.2d 541, 549-50 (Minn. Ct. App. 2011). The majority also held Plaintiffs' claims were barred by the educational malpractice doctrine as articulated in *Alsides* because they "ultimately challenge the quality of the transition training." *Id.* at 553.

The Court did not reach arguments that the verdict was not supported by legally sufficient evidence on causation, or that judgment could not be entered against UNDAF in favor of Plaintiffs who never sued it. UNDAF requested cross-review of both issues, which the Court granted when it granted review of the Court of Appeals' decision.

STATEMENT OF FACTS

A. Response to Appellants' and Amici's Statements of Facts

The statements of facts provided by Plaintiffs, the Estate of Prokop, and their *amici curiae* ignore that the clear focus of the case Plaintiffs brought to a verdict was on *the quality of flight instruction delivered*. Never was the case solely about “specifically promised” instruction. (Glorvigen Br. 15.) Nor was it a “duty to warn,” “duty to instruct,” or “duty undertaken” case. In no way was it a case involving “consumers injured by defective products.” (Minnesota Association for Justice (“MAJ”) Br. 3.)

On appeal, Plaintiffs focus on the alleged omission of instructional Flight 4a, which included in-flight instruction on the SR-22 aircraft's autopilot. But even this focus is inaccurately presented. Plaintiffs contend autopilot instruction “was not given *at all*.” (Glorvigen Br. 27 (emphasis in original).) In fact, Prokop received documentation and ground training on the device and completed Flights 1 and 5A during which autopilot proficiency was specifically addressed. (Trial Ex. 4, at A153, 158.)

By their own admission, “Plaintiffs do not complain that the training materials—the Initial Training Syllabus (A.152-160), the Cirrus SR22 Training Manual (A.164-351), and the PowerPoint slides used during the training (A.399-512) were deficient.” (Glorvigen Br. 41-42.) One of those slides visually depicted the exact “VFR Into IMC” procedure Plaintiffs claim Prokop was never taught: (1) “Establish Straight and Level,” (2) Activate Autopilot to Hold Heading and Altitude,” (3) “Reset Heading for a 180° Turn,” and (4) “Contact ATC For Assistance.” (UNDAF Add. 14.)

Plaintiffs claim “no complaint is made about the ‘pedagogical method’ used to give instruction to Prokop.” (Glorvigen Br. 42.) The record demonstrates otherwise. Plaintiffs’ Complaints alleged lack of “scenario-based” training caused the crash, and expert testimony from airline pilot James Walters specifically attacked the pedagogical method. (A6, 10; Tr. 288:17-289:19.) Yet the three Appellant’s Briefs and two supporting *amici curiae* briefs are silent on this theory—presumably because it falls squarely within the educational malpractice bar.

Appellants also ignore that Walters claimed lack of “management oversight” was a causal factor and that Prokop lacked “tools” not only to recover from weather conditions but to assess flight risks. (Tr. 276:21-227:10-24, 278:1-281:24.) But Prokop’s first flight instructor, Steven Day, testified he trained Prokop on aeronautical decision-making, including whether to fly in the dark. (Tr. 1201:22-1203:10.) Even if the adequacy of that instruction could somehow be separated from instruction criticized during trial, Plaintiffs still alleged ineffective teaching—claims barred by the educational malpractice doctrine.

Plaintiffs repeatedly try to characterize the appeal as a “duty to warn” product-liability case. But when read as a whole, Plaintiffs’ Complaints demonstrate this was a negligent-instruction case, not a product-liability case. Judge Magnuson had already dismissed strict liability and warranty claims (A50-64), and the jury was instructed only on general negligence (A116-17). And the special-verdict form lacked specific questions necessary to support Plaintiffs’ representations to this Court that the jury “*found* that Defendants never gave Flight Lesson 4a” and “*found* that this failure was a direct cause

of the fatal crash.” (Glorvigen Br. 25 (emphasis added).) The general negligence verdict constituted no such “findings.” (Gartland Add. 49-50.)

But that is not all. Appellants suggest on appeal that the autopilot procedure was the only way Prokop could have recovered from entering IMC-like conditions.³ But Day testified he taught Prokop to do the standard procedure for escaping such conditions, which is “to fly wings level and to start a turn, [a] 180-degree turn to get out of the situation.” (Tr. 440:19-441:8, 588:10-13, 1176:7-14, 1201:22-1202:13.) It was a procedure with which an autopilot could assist but for which one was not required. (Tr. 441:9-22.) It also is depicted in the PowerPoint slides that Plaintiffs concede were adequate. (Tr. 1176:7-14; UNDAF Add. 14.) This is a basic piloting procedure, well within the grasp of a pilot such as Prokop who had completed instrument training and merely awaited Day’s certification that Prokop could fly with an FAA inspector to earn his instrument rating. (Tr. 1194:16-1195:9.)

In claiming Prokop did not know how to operate the autopilot, Plaintiffs cite testimony from Prokop’s friend, Patrick Bujold, who described Prokop as “not comfortable” with the device. (Gartland Br. 18.) But Bujold, who owned a Cirrus aircraft, testified he flew with Prokop four times in a Cirrus, and that Prokop knew how to “engage the autopilot,” explaining: “I witnessed him do it several times. I instructed him on how to do it and then I watched him do it.” (Tr. 985:9-12, 987:25-988: 24.)

³ VFR, or Visual Flight Rules, refers to weather conditions when visibility is three miles or greater and the cloud “ceiling” 1,000 feet or greater. (Tr. 188:9-19.) IMC, or Instrument Meteorological Conditions, is anything not VFR. (Tr. 189-25-190:5.)

Gartland repeatedly contends—without citation to the record—that federal law prohibited Cirrus from letting Prokop take the SR-22 off Cirrus property without a “high performance aircraft endorsement.” (Gartland Br. 3, 5, 7.) In fact, federal law prohibited Prokop from *flying* the aircraft without endorsement. (Tr. 1528:1-7.) Along that line, Gartland refers to a “High Advanced Technical Aircraft Endorsement” (Gartland Br. 12), but there is no such thing. Moreover, high-performance endorsements relate to horsepower and not avionics.

B. Transition Training and Prokop’s Background As a Pilot

Prokop entered the Cirrus classroom fully licensed and with about 225 hours of flight time, mostly in a Cessna 172. (Tr. 230:5-18, 231:6-9.) As a VFR-rated pilot, Prokop was not licensed to fly “in the clouds,” *e.g.* in IFR or IMC conditions requiring flight instruments for navigation. (Tr. 444:20-445:2, 593:1-2, 849:22-850:5.)

The purchase price of the SR-22 included transition training. (Tr. 1475:3-1476:19; Trial Exs. 17-18.) Cirrus gave the training by subcontract with UNDAF and with curriculum Cirrus provided to UNDAF. (Tr. 490:8-14; Trial Ex. 21.) The Cirrus Design Pilot Training Agreement stated “[n]either Cirrus, nor its training contractor, will be responsible for competency of Purchaser (or Purchaser’s pilot) during or after training.” (Trial Ex. 7, at A163.)

UNDAF employee Yuweng Shipek trained Prokop in Duluth December 9-12, 2002. (Tr. 789:14-790:9; Trial Ex. 4, at A152-59.) Because Prokop was licensed, he received “transition training,” which Shipek described as “custom tailored” to reflect

Prokop's prior experience and to provide instruction on the SR-22's features including the autopilot. (Tr. 785:9-22.)

It is undisputed that autopilot instruction was given. Autopilot instructions were included in the "pretraining packet" Prokop was to have reviewed before arriving at Cirrus. (Tr. 543:15-544:20, 545:9-12.) The transition training also included ground instruction on the autopilot. (Tr. 387:3-10.) The curriculum further included a series of in-flight lessons, three of which addressed the autopilot: Flight 1, "Introduction & Orientation Flight," including the item "Intro to Autopilot operation"; Flight 4A, "IFR Flight (non-rated)," including the item "Recovery from VFR into IMC (auto-pilot assisted)"; and Flight 5A, "Final Evaluation Flight (VFR)," including the item "Autopilot operations." (A153-58.) Prokop's training syllabus was Trial Exhibit 4; it shows checkmarks next to autopilot lessons during Flights 1 and 5A but not Flight 4A. (*Id.*) Shipek testified he had instructed Prokop on the VFR-into-IMC procedure as part of one of the flights but "it was not documented." (Tr. 792:13-18.)

Shipek likened the autopilot to a motor vehicle's "cruise control" because it contains an "altitude hold button" and "heading bug" to help the pilot fly a certain direction. (Tr. 846:1-847:23.) Shipek's supervisor, John Wahlberg, explained the autopilot was not a flight instrument responsive to verbal cues such as "get me out of here or take me here," but rather a device to assist pilots with accomplishing basic maneuvers. (Tr. 589:8-12.) Among those maneuvers was the VFR pilot's standard procedure for escaping IMC conditions. (Tr. 589:13-16.) As Wahlberg explained, a pilot with

Prokop's experience escapes such conditions by making a 180-degree turn and "the autopilot just makes that easier." (Tr. 589:13-21, 591:10-12.)

C. The January 18, 2003 Crash, Trial Evidence, and Walters' Testimony

On the morning of the January 18, 2003 crash, it was dark and Prokop knew the weather was marginal. During 4:55 a.m. and 5:40 a.m. weather briefings, Prokop told the weather briefers that "the clouds are kind of low" and "it's kind of marginal here at Grand Rapids" but that he was "hoping to slide underneath it and then climb out." (Tr. 328:8-10, 331:1-16, 336:25-337:21, 339:13-340:14.) The weather briefers confirmed for Prokop that "the clouds are kind of low now in Grand Rapids," a passing cold front had created a "potential for some IFR," and clouds obscured about half the sky with a few clouds at 100 feet. (Tr. 328:8-10, 331:1-16, 332:22-333:5, 336:25-337:21, 339:13-340:14, 344:2-10.)

The crash occurred in darkness at 6:30 a.m. in a sparsely populated area with few lights. (Tr. 215:7-8, 335:23-336:1, 347:9-11.) The men died at the crash scene near Hill City, Minnesota. (A1, 9.) Based on weather data and witness statements, Plaintiffs' expert, airline pilot James Walters, concluded Prokop had entered "IMC-like" conditions and decided to return to Grand Rapids. (Tr. 212:21-213:5, 222:14-20; Trial Ex. 55.) Based on his wreckage analysis, altitude data, and National Transportation Safety Board reports, Walters concluded the aircraft entered "an accelerated stall" and crashed. (Tr. 215:4-218:7, 221:19-222:6.) Walters and Cirrus' expert, Dr. Robert C. Winn, agreed Prokop had hand-flown the aircraft. (Tr. 223:19-224:6, 1612:1-3.)

Walters identified three “root causes” of the crash: (1) Prokop “made a poor decision to go flying that day,” (2) Prokop lacked “tools” to appropriately assess aeronautical risks, and (3) Prokop lacked “the proper tools to be able to recover” from inadvertently encountering IMC-like conditions:

[T]here were three root causes. One is attached to the second one. But **number one, Mr. Prokop made a poor decision.** You know, you just have to accept that. He made a poor decision to go flying that day. However, and this is where the attachment comes in, it is my opinion that Mr. Prokop was not given the tools that he needed to make an appropriate decision. You have to be able to access [sic] the risks in anything that you do to decide whether or not it’s what you should be doing. So he wasn’t given the tools to do that and then finally when he got in a situation where he needed to recover from a bad place. Again, he wasn’t given the proper tools to be able to recover from that event. So any of those chains—the chain could have been broken in any of those places but it was not.

(Tr. 227:2-24 (emphasis added).)

Walters agreed Prokop received ground training on the autopilot. (Tr. 387:3-10.) Because Flight 4A’s “Recovery from VFR into IMC (auto-pilot assisted)” item was unchecked on Prokop’s training syllabus, Walters assumed that lesson must have been “completely skipped” and that Prokop “was not trained for proficiency” on the device.

(Tr. 259:7-260:5.)

Over UNDAF’s objection, Walters testified lack of autopilot training was causally related to the crash:

Q: Do you have an opinion as to whether that failure was causally related to this crash?

Walters: I do.

UNDAF counsel: Objection, calls for speculation.

Court: Overruled.

Walters: I do believe that it was causally related to the accident.

Q: Why is that?

Walters: Had Mr. Prokop been adequately trained in the use of the autopilot, I believe that he would have been able to recover from this situation by using the autopilot and the crash would not have occurred.

(Tr. 273:23-274:14.)

According to Walters, other “causally related” factors included (1) UNDAF’s lack of “management oversight” of training documentation; (2) lack of risk-assessment training, which would have taught Prokop to consider his “physical state” and “emotional state” before flying; and (3) lack of “scenario based training,” which he defined as “fly the way you train, train the way you fly”:

Q: Was the fact that the training given to Mr. Prokop was not scenario based causally related to this crash?

UNDAF counsel: Objection, speculation.

Court: Overruled. You can answer that.

Walters: Yes, I believe it was causally related.

Q: Why is that?

Walters: Had the 4-A flight, the recovery from IFR, VFR pilot that been [sic] conducted in an appropriate scenario based environment where the pilot actually gets to perform the maneuver while in the conditions that he’s going to be in when he should accidentally find himself in that situation, he would be much more prepared. In fact, I believe that he would be able to recover from it after having done it in training.

(Tr. 276:21-277:9, 278:1-281:19, 288:17-289:19, 290:22-291:15.)

On cross-examination, Walters agreed a pilot's pressures to reach a destination are "always a consideration" and were a factor given Prokop's desire to attend his son's 7:15 a.m. hockey game. (Tr. 329:2-23.) Walters also agreed the weather, darkness, clouds, and flight route over sparsely populated areas were factors and "I would have recommended that he not take off." (Tr. 356:20-357:11.) Walters again agreed Prokop had received ground instruction on the autopilot and that the "Intro to Autopilot Operation" item had been completed during Flight 1. Because Walters had no access to a "complete syllabus," however, he had no knowledge of whether Prokop demonstrated autopilot proficiency during his final evaluation flight and conceded "I don't know what he was taught and what he was not taught." (Tr. 383:19-384:1, 387:3-10, 389:2-8.)

Walters agreed federal regulations did not require UNDAF to provide either autopilot instruction or a training syllabus. (Tr. 403:13-404:13.) Walters further agreed the training syllabus did not demonstrate whether Prokop knew how to use the autopilot, and he testified he was "assuming" Prokop's lack of proficiency on the device based on Lesson 4A's unchecked item. (Tr. 406:9-407:6.) Walters admitted there was "absolutely" no way to know whether Prokop tried to use the autopilot and agreed Prokop ultimately was responsible for knowing how to use it:

Q: If he had any doubt about his ability to operate the autopilot, he needed to take that into consideration, that's part of the both pilot and the plane consideration, correct?

A: Correct.

Q: Because he's the pilot in command, right?

A: Correct, he is.

* * *

Q: Would it be, under the pilot in command concept, wouldn't you agree with me that to take off without knowing how the plane operates with an excuse of "I wasn't trained properly" is not acceptable?

A: I would agree with you.

(Tr. 437:23-438:13, 438:22-439:2, 445:12-17.)

Walters agreed Prokop would have come already trained on the standard procedure for escaping IMC-conditions with or without an autopilot—"to fly wings level and to start a turn, 180-degree turn to get out of the situation." (Tr. 440:19-441:8.) Walters further agreed that to receive his pilot's license Prokop had to demonstrate proficiency on this standard procedure without an autopilot. (Tr. 442:18-443:5.) Walters also agreed that before the transition training, Prokop would have attained "tools" from his non-UNDAF flight instructor Steven Day about how to decide whether the weather is conducive to flight. (Tr. 414:23-415:8, 435:1-8.)

Day testified he had flown with Prokop one day before the crash. (Tr. 1180:3-5.) Day testified he had provided Prokop with the bulk of his training and had not used a "formal syllabus," and that Prokop was proficient with the standard procedure a VFR-rated pilot uses to escape IMC conditions. (Tr. 1200:15-1203:10.)

Shipek, the UNDAF instructor, testified he typically had students use the autopilot around 50% to 60% of the time and further testified he had instructed Prokop on what to do when inadvertently entering IMC conditions but that the procedure "was not documented." (Tr. 792:13-18, 784:2-5.) Shipek explained that subjecting Prokop to

“actual IMC” conditions “would not be a safe decision on my part,” so he followed the industry standard and provided “under the hood” training whereby Prokop executed the 180-degree-turn procedure in good weather but with vision obscured. (Tr. 792:19-793:8.)

ARGUMENT

This appeal presents weighty public-policy considerations involving negligence duties to be imposed on educators for allegedly inadequate teaching.

The common law encourages educators to protect students from injury while under their care and control. But the common law does not require an educator to ensure students competently learn everything they might need to know. Imposing such a negligence duty would go against public policy; it would create impractical standards of care, ignore uncertainties regarding causation, initiate a flood of litigation against schools, and embroil Minnesota courts in micromanaging education. These are the public policies underlying the “educational malpractice” doctrine, which has been universally adopted, and which the Court of Appeals correctly applied when directing judgment in favor of UNDAF.

Against this backdrop, there are three independent reasons why the Court must affirm the Court of Appeals’ decision with respect to UNDAF:

First, UNDAF could owe no duty to Prokop or Kosak. This is because their injuries occurred outside the course of instruction, so public policy as reflected in the educational malpractice doctrine bars the claims as a matter of law.

Second, even if there were a duty, the record lacks competent, legally sufficient evidence that training-related negligence caused the crash.

Third, the district court had no legal basis for entering judgment against UNDAF, which Plaintiffs concede they never sued. (Gartland Br. 27; Glorvigen Br. 36.)

I. UNDAF'S RESPONSE TO APPELLANTS' BRIEFS

A. Standard of Review

Existence of a legal duty is a question of law reviewed *de novo*. *Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009). A district court errs by submitting a negligence claim to a jury when no duty exists, irrespective of the evidence and jury's verdict. *ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 308 (Minn. 1996).

B. UNDAF Owed No Duty to Prevent Injury After Instruction Had Ended

This was not a product-liability case. Rather, Plaintiffs claimed Cirrus failed to train Gary Prokop to competency. But the crash occurred after training had ceased, and under *Larson v. Independent School District No. 314*, 289 N.W.2d 112 (Minn. 1979), only injuries occurring *during* instruction are cognizable. Further, this Court has held pilots are responsible for their own negligence unless a flight instructor is on board. These holdings and principles complement and in no way conflict with the public-policy-based educational malpractice doctrine, which bars negligence claims such as these challenging quality of flight instruction.

Appellants and *amici curiae* do not urge the Court to reject the doctrine. Had they done so, they would be asking for Minnesota to stand alone. From Alaska to Delaware, supreme courts across the country have adopted the doctrine to bar negligence claims against educators. When adopting and applying the bar, courts often cite the Minnesota Court of Appeals' well-regarded 1999 *Alsides* decision, which no court has ever rejected. The doctrine has been applied even in situations Plaintiffs claim it cannot be allowed to exist—in personal-injury cases, when the educator was not a public school or traditional

college or university, and when the plaintiff purchased the equipment from the training entity. Courts in Missouri and South Dakota have specifically applied the doctrine to bar claims involving flight training.

1. Existence of a Duty Depends on Public Policy and the Relationship Between the Parties, Not on Whether an Injury Is Foreseeable

A duty is “an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” *Becker v. Mayo Found.*, 737 N.W.2d 200, 212 (Minn. 2007) (quoting W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 53, at 358 (5th ed. 1984)). A duty imposes an obligation “to conform to a standard of conduct for the protection of others against unreasonable risks.” *Carlson v. Rand*, 275 Minn. 272, 276, 146 N.W.2d 190, 193 (1966). As with any element of negligence, Plaintiffs bear the burden of proving a duty. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987). If Plaintiffs fail, judgment in favor of Defendants must be affirmed. *Carlson*, 275 Minn. at 276, 146 N.W.2d at 193.

Plaintiffs and Estate of Prokop fail to demonstrate how public policy permits imposing a duty on a flight instructor to protect against student or passenger injuries after instruction has ended. Rather, they cite *Germann v. F.L. Smith Machine Co.*, 395 N.W.2d 922 (Minn. 1986) and echo the Court of Appeals’ dissent to suggest the majority erred by not considering whether the crash was *foreseeable*. (Glorvigen Br. 19-20; Estate Br. 13-16.) But *Germann* was a product-liability case. This is not. Even so, under *Germann* the Court first ascertains whether the connection between the event causing damage and the alleged negligent act “is too remote to impose liability as a matter of

public policy.” *Id.* at 924. Only if the act is not too remote does the Court proceed on to consider whether it is “reasonably foreseeable.” *Id.*

Here, the allegedly negligent flight training ended a month before the crash and numerous factors were at play including Prokop’s poor decision to fly. The training was too remote from the crash and a duty cannot be imposed consistent with the public policies underlying *Germann*, which would include precisely the same policies reflected in the educational malpractice doctrine, *e.g.* “inherent uncertainties about causation.” *Alsides*, 592 N.W.2d at 472. Accordingly, the foreseeability of a crash is not controlling, and the dissent’s suggestion that the verdict can be reversed only if “manifestly against the entire evidence” is incorrect, too, when imposing a duty would be inconsistent with public policy. *Glorvigen*, 796 N.W.2d at 559-60 (Klaphake, J., dissenting) (Gartland Add. 35-36).

Plaintiffs essentially allege flight trainers had a duty to protect Prokop and Kosak. But existence of such a duty depends first “on the relationship of the parties,” *e.g.*, whether there is a “special relationship,” and if the relationship does not militate in favor of a duty the Court does not consider foreseeability. *Donaldson v. Young Women’s Christian Ass’n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995) (holding boarding house had no special relationship with resident to prevent suicide, so “we need not reach the issue of foreseeability”); *accord Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 676 (Minn. 2001) (not addressing foreseeability where residential landlord had no special relationship with tenant to keep out murderous intruders).

“Ultimately, whether a special relationship and its concomitant duty exist is a question of policy.” *Id.* at 673. Here, public policy militates against imposing a duty with respect to flight instruction for injuries occurring after instruction has ended.

2. A Flight School Has a Duty to Protect Students During Instruction, But Not Weeks After Instruction Has Ended

The bounds of an educator’s negligence duty to protect against injury to students are reflected in *Larson v. Independent School District No. 314*, 289 N.W.2d 112 (Minn. 1979). The case involved an eighth-grader’s gym-class injury for which a first-year gym teacher and the school principal were found negligent. *Larson* does not conflict with either the educational malpractice doctrine or the decision below. As the Court of Appeals explained, “although *Larson* recognizes that teachers and principals owe a duty of care to their students, the duty must be considered in context: an injury that occurred *during* educational instruction.” *Glorvigen*, 796 N.W.2d at 556 (emphasis added). Here, the injuries did not occur during instruction, and *Larson* does not authorize the claims.

Plaintiffs focus on the school principal’s negligence and claim it “took place outside of the classroom and long before the injury.” (Gartland Br. 40-41.) Actually, the principal was negligent because he failed to supervise a first-year teacher who had been on the job for barely a month. *Larson*, 289 N.W.2d at 115-16. Further, as the Court of Appeals explained, the principal’s duty was to students and teachers “within the school” and “during the school day.” *Glorvigen*, 796 N.W.2d at 555-56 (quoting *Larson*, 289 N.W.2d at 118).

Plaintiffs cite no decision where a duty has been imposed outside the course of instruction—particularly in favor of a non-student such as Kosak. The Connecticut decisions Appellants cite arose from injuries sustained during instruction, as in *Larson*. See *Doe v. Yale Univ.*, 748 A.2d 834, 846-50 (Conn. 2000) (medical school liable for resident’s needle injury incurred “in the course of instructing her”); *Kirchner v. Yale Univ.*, 192 A.2d 641, 643 (Conn. 1963) (same, for injury during woodworking shop instruction).

The rule that educators can be liable for injury only during instruction translates seamlessly into the flight context, where the “pilot in command” of an aircraft is “responsible for his own negligence when flying solo.” *Lange v. Nelson-Ryan Flight Service, Inc.*, 259 Minn. 460, 465, 108 N.W.2d 428, 432 (1961). Only “when flying *with a flight instructor* a trainee is a passenger, and the responsibility of the flying school to him is measured by the legal standard of a carrier.” *Id.* (emphasis added); accord 14 C.F.R. § 91.3(a) (“The pilot in command of an aircraft is directly responsible for, and is the final authority as to, the operation of that aircraft.”).

Walters agreed Prokop was the pilot in command. (Tr. 438:9-10.) Had Shipek been on board during the crash, UNDAF may have owed a duty consistent with *Lange* and *Larson*. But those are not the facts.

3. Consistent With the Educational Malpractice Doctrine, Flight Instructors Have No Duty After Instruction is Completed

The educational malpractice doctrine recognizes that, after the instruction is completed, an instructor who is done instructing cannot “ensure that plaintiff would make

proper use of the instruction he received”; accordingly, a jury could only “speculate about whether such negligence was a proximate cause” of a physical injury. *Page v. Klein Tools, Inc.*, 610 N.W.2d 900, 906 (Mich. 2000). Guarding against educator liability based on speculation is reflected in the four universally recognized public-policy bases courts cite to bar claims challenging quality of education delivered:

(1) the lack of a satisfactory standard of care by which to evaluate an educator; (2) the inherent uncertainties about causation and the nature of damages in light of such intervening factors as a student’s attitude, motivation, temperament, past experience, and home environment; (3) the potential for a flood of litigation against schools; and (4) the possibility that such claims will “embroil the courts into overseeing the day-to-day operations of schools.”

Page, 610 N.W.2d at 903 (quoting *Alsides*, 592 N.W.2d at 472); accord *Glorvigen*, 796 N.W.2d at 554.

Fifteen state courts of last resort have adopted the educational malpractice bar.⁴ Intermediate appellate courts in at least twelve more states also have done so.⁵ Finding

⁴ See *Blane v. Ala. Comm’l College, Inc.*, 585 So. 2d 866 (Ala. 1991); *D.S.W. v. Fairbanks North Star Borough School Dist.*, 628 P.2d 554 (Alaska 1981); *CenCor, Inc. v. Tolman*, 868 P.2d 396 (Colo. 1994); *Gupta v. New Britain General Hosp.*, 687 A.2d 111 (Conn. 1996); *Moss Rehab. v. White*, 692 A.2d 902 (Del. 1997); *Brantley v. Dist. of Columbia*, 640 A.2d 181 (D.C. 1994); *Wickstrom v. North Idaho College*, 725 P.2d 155 (Idaho 1986); *Moore v. Vanderloo*, 386 N.W.2d 108 (Iowa 1986); *Finstad v. Washburn Univ. of Topeka*, 845 P.2d 685 (Kan. 1993); *Hunter v. Bd. of Educ.*, 439 A.2d 582 (Md. 1982); *Page*, 610 N.W.2d at 905; *Donohue v. Copiague Union Free Sch. Dist.*, 391 N.E.2d 1352 (N.Y. 1979); *Hendricks v. Clemson Univ.*, 578 S.E.2d 711 (S.C. 2003); *Wilson v. Continental Ins. Cos.*, 274 N.W.2d 679 (Wis. 1979); *Natrona County Sch. Dist. No. 1 v. McKnight*, 764 P.2d 1039 (Wyo. 1988).

⁵ *Key v. Coryell*, 185 S.W.3d 98 (Ark. Ct. App. 2004); *Peter W. v. San Francisco Unif. Sch. Dist.*, 60 Cal.App.3d 814 (1976); *Tubell v. Dade County Pub. Schs.*, 419 So. 2d 388 (Fla. Ct. App. 1982); *Rich v. Kent. Country Day, Inc.*, 793 S.W.2d 832 (Ky. Ct. App.

this authority to be “overwhelming,” the Seventh Circuit Court of Appeals has held the Illinois Supreme Court likely would adopt the bar. *See Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992). Neither Plaintiffs nor the Estate of Prokop has cited, nor has UNDAF located, a single decision in which a state appellate court has rejected the bar.⁶

Glorvigen contends the bar “has only been applied to organizations that were providing educational services.” (Glorvigen Br. 32.) But UNDAF *was* providing educational services. The Court of Appeals majority cited the Connecticut Supreme Court’s decision in *Gupta* to liken the Cirrus-UNDAF arrangement to a teaching hospital that “assume[s] educational responsibilities related to, but distinct from, its function as an institution for healing the sick.” *Glorvigen*, 796 N.W.2d at 554 (quoting *Gupta*, 687 A.2d at 118).

Glorvigen responds by suggesting the educational malpractice doctrine would not bar a patient’s claim that she was injured due to the hospital’s failure “to adequately instruct the resident on how to perform a test upon her.” (Glorvigen Br. 33.) To be sure,

1990); *Miller v. Loyola Univ. of New Orleans*, 829 So. 2d 1057 (La. Ct. App. 2002); *Alsides*, 592 N.W.2d at 472; *Dallas Airmotive, Inc. v. FlightSafety Int’l, Inc.*, 277 S.W.3d 696 (Mo. Ct. App. 2008); *Swidryk v. St. Michael’s Med. Center*, 493 A.2d 641 (N.J. Super. 1985); *Rubio v. Carsbad Mun. Sch. Dist.*, 744 P.2d 919 (N.M. Ct. App. 1987); *Lawrence v. Lorain County C’mty College*, 713 N.E.2d 478 (Ohio Ct. App. 1998); *Bittle v. Okla. City Univ.*, 6 P.3d 509 (Okla. Ct. App. 2000); *Cavaliere v. Duff’s Bus. Inst.*, 605 A.2d 397 (Pa. Super. 1992).

⁶ The Seventh Circuit identified Montana as a potential exception, based on the decision in *B.M. by Burger v. State*, 649 P.2d 425 (Mont. 1982), where the Montana Supreme Court held a constitutional provision ensuring the right to “equality of educational opportunity” imposed a duty on the state to provide for special-education students. The case was later effectively abrogated on immunity grounds. *See Hayworth v. Sch. Dist. No. 19*, 795 P.2d 470, 473 (Mont. 1990).

when a patient is injured during a physician-in-training's residency, the injury occurs *while the patient was under the hospital/educator's care and control* and an educator can be liable. However, the doctrine would bar a lawsuit against the teaching hospital for injury incurred after the physician was licensed and practicing elsewhere. *Moore v. Vanderloo*, 386 N.W.2d 108, 112 (Iowa 1986) (barring claims against chiropractic school). Kosak was similar to such a patient.

Neither Appellants nor MAJ suggests *Alsides*—which involved Brown Institute, “a for-profit, proprietary trade school,” 592 N.W.2d at 470—was wrongly decided. The Attorney General, misunderstanding this to be a product-liability case, suggests the Court adopt a rule limiting the educational malpractice doctrine to “public schools and similar non-profit educational institutions.” (AG Br. 6-9.) But UNDAF *is* a non-profit educational institution. (Tr. 495:5-11.)

Finally, Appellants cite no authority that suggests UNDAF ceases to be an educator by contracting with Cirrus. Educational institutions and instructors have rights to contract. *See, e.g., Johnson v. Carlson*, 507 N.W.2d 232, 233 (Minn. 1993) (citing statute authorizing Iron Range Resources and Rehabilitation Board commissioner to “contract with the state university system” to offer courses in taconite-assistance area). The Court would certainly not endorse claims against a law school whose professor contracts to provide Continuing Legal Education instruction for a for-profit CLE provider, but that is essentially what is sought here.

4. The Educational Malpractice Bar Provides No Broad “Immunity,” But It Does Apply to Personal Injury Claims Involving Training Programs

The educational malpractice doctrine affords no “immunity” for all claims against educators. (Glorvigen Br. 32.) The doctrine authorizes contract and fraud claims against schools “based on failure to provide specifically promised educational services.” *Alsides*, 592 N.W.2d at 472; cf. *Zinter v. Univ. of Minn.*, 799 N.W.2d 243, 246-47 (Minn. Ct. App. 2011) (holding educational malpractice doctrine barred former graduate student’s breach of contract and promissory estoppel claims), *rev. denied* (Minn. Aug. 16, 2011).

Numerous courts have applied the doctrine to bar claims alleging personal injury attributable to instruction by institutions that are not public schools, colleges, or universities. See *Page*, 610 N.W.2d at 901 (utility-pole-climbing course); *Moss Rehab. v. White*, 692 A.2d 902, 906 (Del. 1997) (driving school); *Moore*, 386 N.W.2d at 112 (chiropractic school).

In *Page*, the Michigan Supreme Court barred a utility-pole-climbing student’s claim involving injury incurred as he was using equipment he had purchased from the trainer. 610 N.W.2d at 901. The court applied the *Alsides* court’s public-policy considerations including the “inherent difficulty in attempting to define the applicable standard of care” and “declin[ed] to become embroiled in the task of determining whether a trade school . . . should be held liable in tort for failing to teach specific methods of climbing.” *Id.* at 905-06. Those exact concerns were present here, too, despite Plaintiffs’ post-trial attempts to characterize this as a product-liability case.

Gartland claims “the tort duty [the flight trainers] breached was the obligation reasonably to provide appropriate instruction.” (Gartland Br. 36 n.7.) But as in *Page*, the core problem is, how was the jury to determine what training was reasonable and appropriate? Moreover, whenever improper education is alleged, “any connection between plaintiff’s injury and the alleged negligence on the part of [the trainer] is remote at best.” *Page*, 610 N.W.2d at 907. Here there were even more causation-connection uncertainties than in *Page*. Unlike the plaintiff in that case, Prokop came already trained on “risk assessment” procedures and how to escape IMC-like conditions without an autopilot.

Iowa and Delaware decisions demonstrate the dangers of imposing a duty here, particularly in favor of non-student passenger Kosak. In the Delaware case, a motor vehicle passenger prevailed in a wrongful death trial against a driver’s training school, based on allegations of inadequate driving instruction. *Moss Rehab.*, 692 A.2d at 904. The Delaware Supreme Court reversed, holding the common law recognized no “third-party claim for educational malpractice by a driving school.” *Id.* at 909. The Court further held that because driver competency is “extensively regulated by statute,” the legislature was “best able to address” the public-policy ramifications. *Id.* at 908-09. Similarly, flight safety and pilot training are regulated by the FAA, which approved the methods and curriculum and required neither autopilot training nor a syllabus. (Tr. 400:20-401:21, 403:20-404:13.) A state law negligence cause of action for flight training would be without Congressional or FAA authorization.

In rejecting injury claims based on educational malpractice against a chiropractic school, the Iowa Supreme Court warned of malpractice cases within malpractice cases and a “flood of litigation” against educators ranging from medical and law schools to electrical trade schools:

For example, a doctor or attorney sued for malpractice by a patient or client might have an action against his or her educational institution for failure to teach the doctor or attorney how to treat or handle the patient or client’s problem. This would deplete a great amount of resources, both in terms of time and money spent by an institution, on litigation. Further, if an educational malpractice claim is allowed against a professional school, could we logically refuse to recognize such a cause of action against an institution offering training courses for certain trades? **For example, would a homeowner damaged by faulty wiring have a cause of action against the electrical trade school?**

Moore, 386 N.W.2d at 111, 114-15 (emphasis added).

If the Court creates a duty here, Minnesota law would countenance not only pilot and passenger claims against flight schools but also claims of motor-vehicle drivers and passengers against driving schools, doctors and patients against medical schools, lawyers and clients against law schools, and chefs and diners against cooking schools. This would be unprecedented and would gravely hinder the administration of justice and increase the burden on the courts system.

Requiring educators to cover every course-syllabus subject would be unworkable. In a legal malpractice case involving a missed statute of limitations, no court would authorize a claim against a law school premised on a professor’s failure to specifically lecture on a statute-of-limitations lesson listed on a course syllabus. A lawyer has a duty to practice law reasonably and competently, anticipating statutes of limitations. And a

pilot has the duty to operate his aircraft safely, anticipating IFR conditions consistent with the pilot's experience and licensure.

5. The Educational Malpractice Doctrine Has Been Applied to Bar Claims Involving Flight Training

Courts have applied the educational malpractice doctrine to bar claims alleging incomplete flight training, including when a specific procedure was not taught. Training on an engine-shutdown procedure was at issue in *Dallas Airmotive, Inc. v. FlightSafety International, Inc.*, 277 S.W.3d 696, 701 (Mo. Ct. App. 2008), which involved a Piper turboprop crash that killed the pilot and four passengers. Surviving family members sued aircraft-maintenance company Dallas Airmotive, Inc. and Flight Safety International, which provided FAA-approved ground and simulator training to a pilot who, like Prokop, came already licensed. *Id.* at 698. Dallas Airmotive settled with the plaintiffs and pursued its cross-claim seeking contribution from FlightSafety International. *Id.*

In affirming a summary judgment that barred the negligence-based cross-claim, the Missouri Court of Appeals cited *Page* for the proposition that the educational malpractice bar applies to trainers. *Id.* at 699-700. The court then quoted *Alsides* to articulate why flight training fits within the bar, explaining that adjudicating such claims would involve “a comprehensive review of a myriad of educational and pedagogical factors, as well as administrative policies that enter into the consideration of whether the method of instruction and choice of [teaching aids] was appropriate, or preferable.” *Id.* at 700 (quoting *Alsides*, 592 N.W.2d at 472). For that reason, courts “have refused to become the ‘overseers of both the day-to-day operation of [the] educational process as

well as the formulation of its governing policies.” *Id.* (quoting *Alsides*, 592 N.W.2d at 472).

Appellants do not attempt to explain why it was error for the Missouri court to apply the underlying public policies of *Alsides* to bar claims alleging incomplete flight training. And the *Alsides*-articulated rationales apply with full force here. By presenting testimony criticizing lack of “scenario-based” training and “management oversight,” Plaintiffs directly attacked administrative policies and methods of instruction. And the Missouri court emphasized that it was not addressing a case of an injury during instruction, unlike in the Connecticut cases that Plaintiffs cite and that the Missouri court readily distinguished. *Id.* at 700-01 (citing *Doe*, 748 A.2d at 846-50; *Kirchner*, 192 A.2d at 643). Appellants ignore this.

The policy rationales were essentially the same in *Sheesley v. Cessna Aircraft Co.*, Nos. Civ. 02-4185, 03-5011, 03-5063, 2006 WL 1084103 (D.S.D. Apr. 20, 2006), where a federal district court in South Dakota barred negligence claims where the pilot and two passengers died. The plaintiffs alleged FlightSafety International was negligent because its flight simulator did not replicate real-world conditions and its curriculum omitted procedures for an exhaust-system failure. The court concluded the claims “encompass the traditional aspects of education” and a ruling to the contrary would make pilot training “a consideration in many, if not most, plane crash litigation.” *Id.* at *15, *17 (quoting *Moss Rehab.*, 692 A.2d at 905; *Moore*, 386 N.W.2d at 115).

The federal court rejected the rule Plaintiffs suggest here—that the educational malpractice doctrine should allow personal injury claims. *Id.* at *18. The court

explained there would be “no principled basis to stop [the court] from determining what curriculum should be taught at medical schools, paramedic schools, commercial truck driving schools, and innumerable other technical and higher education facilities. Public policy suggests that schools, not courts, need to make curriculum decisions.” *Id.* The court further concluded that “the failure to provide an overall education and the negligent failure to train how to perform a specific procedure is a distinction without a difference,” because either way “the plaintiff is alleging that the school did not teach the student what he or she needed to know.” *Id.* at *16.

The same concerns are present here. The allegations involving lack of “scenario-based” training are indistinguishable from the claim FlightSafety International should not have used a flight simulator. And while the barred allegation in *Sheesley* was that exhaust-system-failure instruction was omitted entirely, here UNDAF undisputedly gave four days of training, provided documentation and ground training on the autopilot, and assessed Prokop’s autopilot proficiency during Flights 1 and 5A. (A152-59.) The educational malpractice bar applies here with greater force than in *Sheesely*.

Plaintiffs cite three federal district court decisions they claim hold to the contrary. But each is distinguishable, none is persuasive, and this Court’s analysis and authoritative holding on the duty question under Minnesota law are substantially different than the non-precedential effect of federal district court rulings on state-law issues.

Two of the decisions rested on non-substantive procedural issues involving application of state law in federal court. *In re Cessna 208 Series Aircraft Product Liability Litigation*, 546 F. Supp. 2d 1153 (D. Kan. 2008) was a straightforward

application of the *Erie* doctrine. After a Texas state trial court ruled (without written opinion) that Texas *would* recognize a negligent training claim against FlightSafety International, the case was removed to federal court where a district judge in Kansas reluctantly deferred to the state judge's interpretation of state law. *Id.* at 1158-59.

A federal district judge also deferred to state law in *In Re Air Crash Near Clarence Center, New York*, No. 09-md-2085, 2010 WL 5185106 (W.D.N.Y. Dec. 12, 2010), where defendants alleged FlightSafety International, a New York corporation, had been fraudulently joined to destroy diversity. In remanding to state court, the federal judge explained that a fraudulent joinder motion is subjected "to less searching scrutiny" than a Rule 12 motion and ruled a New York court *might* recognize a cause of action against a flight school on remand. *Id.* at *3-*7.

Finally, the third case was Judge Magnuson's denial of Cirrus' motion for summary judgment in this very litigation. But even if the ruling could be characterized as substantive, it came when UNDAF was not a party. Importantly, Judge Magnuson's basis was that "Cirrus' primary business is building and selling airplanes, not training pilots." *Glorvigen v. Cirrus Design Corp.*, No. 06-2661, 2008 WL 398814 (D. Minn. Feb. 11, 2008), at *4. UNDAF *does* train pilots, so in no way did Judge Magnuson "reject[] the very arguments that defendants advance here." (Gartland Br. 41.) UNDAF intervened to raise these arguments from the unique perspective of a flight educator.

6. The Public Policies Underlying the Educational Malpractice Doctrine Apply in the Flight-Training Context, and the Court of Appeals Made No Error

As the substantial authority cited above demonstrates, the public policies underlying the educational malpractice doctrine—concerns over standards of care, causation, a flood of litigation, and courts micromanaging education—readily apply both in the flight-training context and to the specific facts of this case.

The focus for determining whether these policies apply is necessarily on the *nature* of the training-related claims, not on the *corporate status* or “business” motives behind training. The Attorney General cites media reports and other materials outside the record to disparage for-profit education and urge the Court to create a rule favoring only traditional education. But the Attorney General fails to consider that sometimes even public educators enter into contracts with for-profit entities. And significantly, UNDAF is not a for-profit entity. It is a public nonprofit corporation. (Tr. 495:5-11.)

Standard of care: It would be impossible for a training checklist or course syllabus to delineate the standard of care for delivery of educational services. This impossibility is reflected even in Appellants’ own cited authority. *See Larson*, 289 N.W.2d at 117 n.8 (holding activities in a curriculum bulletin were “guidelines [that] *did not* establish mandatory affirmative duties for teachers, principals, or superintendents”) (emphasis added); *Canada By and Through Landy v. McCarthy*, 567 N.W.2d 496, 504-05 (Minn. 1997) (rejecting argument a “contractor checklist” established standard of care); *Mervin v. Magney Construction Co.*, 416 N.W.2d 121, 124-25 (Minn. 1987) (holding that permitting contracts to delineate a negligence standard of care “confuses contract

obligations, which are voluntarily assumed, with tort obligations, which are fixed and imposed by the law itself without regard to the consent of the parties”).

Causation: Uncertainties surrounding causation and temperament would be inherent in any personal-injury claim premised on a failure to train. Here, the uncertainties were glaring. Prokop came to Cirrus as a licensed pilot already trained on how to make flight decisions and how to escape IMC conditions *without an autopilot*. He received documentation and ground training that Plaintiffs concede was adequate, and he took part in *two flights* where the autopilot was addressed. At trial, Walters conceded he was simply “assuming” Prokop did not know how to use the autopilot, and confessed he did not know whether Prokop even tried to turn it on. On the day of the crash, Prokop knew the weather was cloudy but told a weather briefer he was “hoping to slide underneath it” anyway. Any Minnesotan who has braved icy roads against better judgment can appreciate the temperament behind Prokop wanting to see his son play hockey.

Flood of litigation: Appellants provide the Court with no practical suggestion for how to craft a rule of law that would somehow be limited to the facts of this case. Creating a duty here would invent a cause of action that would apply anytime oral, hands-on training has been provided. This would effectively deter educators with specific expertise from entering into training arrangements with entities such as manufacturers in the first place. And this, in turn, would result in *less* training and *less* instruction—hardly in furtherance of public policy. Altering the law to fit the specific facts of this case would be akin to ignoring statutes of limitations or expert-affidavit requirements

whenever particularly tragic circumstances warrant. But this Court has repeatedly refused to extend Minnesota law in such fact-specific ways.

Micromanaging education: Creating a duty also would embroil Minnesota courts in overseeing a wide variety of curriculum, pedagogy, and administrative decisions. The training syllabus here is indistinguishable from a medical school professor's course syllabus or a cooking school's list of topics to be covered. The decision not to use "scenario-based" training is akin to a law professor's election not to use the Socratic method or a law school's decision not to require externships or practicum instruction. A university's refusal to fly-speck faculty grade books is comparable to the lack of "management oversight" alleged here. Never would the Court hold a driving school negligent for failing to teach a student from rural Minnesota how to navigate Twin Cities freeways. Nor would the Court impose negligence liability for failing to teach a Twin Cities student how to drive down Duluth's hills or safely pass farm machinery. But that is the sort of pedagogical, "scenario-based" second-guessing Appellants urge here.

The Court of Appeals recognized these realities even while focusing its analysis on Flight 4a. The Court correctly concluded that even if this case really did boil down to a missed checkmark on the Flight 4a syllabus, Plaintiffs "ultimately challenge[d] the quality of the transition training." *Glorvigen*, 796 N.W.2d at 553. That is, Plaintiffs alleged Prokop was not adequately taught "what he needed to know to use the autopilot to escape the 'IMC-like' conditions that he encountered before the crash." *Id.*

"This challenge requires review of the instructor's failure to provide flight training, in addition to ground training, regarding use of the autopilot to escape

unexpected IMC conditions.” *Id.* Determining whether the transition training was ineffective “would involve an inquiry into the nuances of the educational process, which is exactly the type of determination that the educational-malpractice bar is meant to avoid.” *Id.* The Court of Appeals’ analysis was well-reasoned and supported by ample authority, and is wholly in line with the relevant, weighty public-policy considerations.

By focusing on the Flight 4a theory, the Court of Appeals gave Plaintiffs every benefit of the doubt. But the case brought to a verdict was not limited to Flight 4a. Plaintiffs’ Complaints criticized the decision not to offer “scenario-based” training, which falls squarely under the educational malpractice bar, as do allegations involving lack of decision-making tools and management oversight. All this evidence constituted an alleged breach of a “duty to educate effectively,” which by definition is an invalid claim of educational malpractice. *Id.* (quoting *Dallas Airmotive*, 277 S.W.3d at 700). In no way would affirming the decision below abrogate this Court’s precedent holding that educators can be negligent for injuries occurring during the course of instruction.

C. Alternatively, UNDAF Owed No Duty to Passenger Kosak

Alternatively, the Court should affirm that UNDAF owed no duty to Kosak, a passenger and non-student. A common carrier has a duty to protect passengers because a “special relationship” exists. *Bjerke v. Johnson*, 742 N.W.2d 660, 665 (Minn. 2007) (citing Restatement (Second) of Torts § 314A (1965)). But UNDAF is not a common carrier, and Glorvigen has articulated *no* relationship between UNDAF and Kosak, let alone a special one. Glorvigen claims the SR-22’s passenger seat made Kosak a “foreseeable user.” (Glorvigen Br. 26.) But nearly all vehicles have passenger seats, and

Glorvigen fails to address flood-of-litigation concerns articulated in *Sheesley, Dallas Airmotive*, and *Moss Rehabilitation*, where courts rejected passenger claims. (UNDAF Br. 27-31.)

Glorvigen cites *Driver v. Burlington Aviation, Inc.*, 430 S.E.2d 476, 480-81 (N.C. Ct. App. 1993) but then acknowledges in a parenthetical that the case involved a manufacturer's "instructional manual." (Glorvigen Br. 26.) As the court below held in distinguishing *Driver*, "the traditional failure to warn [involves] failure to provide the user with written information." *Glorvigen*, 796 N.W.2d at 551 (emphasis added). Here, Plaintiffs "do not claim that this [written] information was inadequate to put Prokop on notice of the dangers associated with piloting the SR22." *Id.* at 552. Glorvigen gives the Court no reason to create a duty burdening flight schools with ensuring passengers' safety.

D. The Court Should Reject Appellants' Attempts to Reshape This Case into a Product-Liability Action

Plaintiffs decry an "attempt to turn this products failure-to-instruct case into an educational malpractice case." (Glorvigen Br. 36.) But it is Appellants and their *amici curiae* who are attempting to turn this general negligence case into a product-liability case. Plaintiffs alleged claims and presented evidence attacking the general quality of instruction; those claims are barred as educational malpractice even though not labeled as such. *Moss Rehab.*, 692 A.2d at 905.

To the extent the Court considers Appellants' product-liability arguments at all, they are aimed at Cirrus. UNDAF adopts and supports Cirrus' arguments, specifically:

- Because the federal court dismissed Gartland’s “failure to instruct” claims, they were not put to the jury. Moreover, Glorvigen never made a product-based claim at all. (Cirrus Br. § II.A.)

- Minnesota law recognizes no cause of action for a “duty to train,” and creating one would violate public policy. Cirrus satisfied any duties it did have by providing written instructions, which Plaintiffs concede were complete and accurate. (Cirrus Br. § II.B.1, § II.B.2.a-c.)

- Creation of the flight-training syllabus did not, in turn, create a training-related duty. Imposing liability for Prokop’s failure to learn to proficiency would violate the educational malpractice bar because Plaintiffs challenged the quality of educational services delivered. (Cirrus Br. § II.B.2.d-e.)

However, UNDAF submits a few additional arguments from a non-manufacturer’s perspective.

In a product-liability case, CIVJIG 75.25 recognizes that a “manufacturer has a duty to provide reasonably adequate warnings for its products to those who use the product[.]” (Gartland Br. 32.) Plaintiffs provide no authority suggesting UNDAF, an entity separate from manufacturer Cirrus, had a duty to warn. *Compare Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826, 832 n.5 (Minn. 1988) (holding non-manufacturer had duty to warn when it became “wholly-owned subsidiary” of manufacturer) with *Dalrymple v. Fairchild Aircraft Inc.*, 575 F. Supp. 2d 790, 793, 797 (S.D. Tex. 2008) (finding no duty to warn where “Swearingen, not Defendant, manufactured the aircraft” even where non-manufacturer had merged with manufacturer).

Further, the jury was not instructed with CIVJIG 75.25 (A107-130); Plaintiffs never requested the instruction. Something beyond a general negligence instruction is *required* for any duty-to-warn claim, regardless of whether it is based in strict liability or general negligence. *Hauenstein v. Loctite Corp.*, 347 N.W.2d 272, 275 (Minn. 1984); *see also Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 94 n.2 (Minn. 1987) (“In cases asserting product liability claims, usually it is preferable that trial courts submit a separate interrogatory on each theory,” including on a theory of duty to warn). The jury instructions lacked such an instruction, conclusively demonstrating this was no duty-to-warn case. Had it been, UNDAF would not have participated.

Plaintiffs cite *Gray v. Badger Mining Corp.*, 676 N.W.2d 268, 274 (Minn. 2004) to contend that “[t]he duty to warn includes the duty to give adequate instructions for the safe use of the product.” (Gartland Br. 30 (emphasis added).) As Cirrus and the Court of Appeals explain, a fair reading of the duty involves written instructions in the plural, not “instruction given orally during flight instruction.” *Glorvigen*, 796 N.W.2d at 551-52. *Glorvigen* claims manufacturers have been liable for inadequate instruction “in a non-written form,” but he cites “safety films,” “posters,” “advertising,” and “videos”—tangible media readily reviewable against a standard of care. (*Glorvigen* Br. 29 n.9.) Defining a standard of care for oral instruction, even as to “products,” is impossible.

MAJ characterizes *Tayam v. Executive Aero, Inc.*, 283 Minn. 48, 166 N.W.2d 584 (1969) as holding an airplane manufacturer had a “duty to adequately instruct” purchasers about whether to use a fuel mixture in certain weather conditions. (MAJ Br. 6-7.) But there too, as in *Gray*, “specific written warning” was at issue. *Tayam*, 283 Minn. at 51,

N.W.2d at 586. *Tayam* certainly does not hold a flight-training contractor has any duty to “warn,” by in-flight instruction or otherwise.

E. The “Duty Undertaken” Theory Applies Only When There Is a Duty to Protect

Appellants suggest UNDAF can be negligent because it “undertook” some duty. (Glorvigen Br. 22-25; Estate Br. 17.) But as the Court of Appeals correctly held, the flight trainers could not have undertaken a duty that did not exist in the first instance. *Glorvigen*, 796 N.W.2d at 556. Further, Appellants’ citations demonstrate the “duty undertaken” doctrine applies only when there is a duty to protect. *See Walsh v. Pagra Air Taxi, Inc.*, 282 N.W.2d 567 (Minn. 1979) (city’s duty to protect from fire); *Carcraft v. City of St. Louis Park*, 279 N.W.2d 801 (Minn. 1979) (same); *Isler v. Burman*, 305 Minn. 288, 232 N.W.2d 818 (1975) (duty to protect from real-property dangers).

The duty undertaken is a “special duty.” *Carcraft*, 279 N.W.2d at 807. Here no duty, “special” or otherwise, was pleaded against UNDAF. As Cirrus also explains, the jury was not instructed on a duty-undertaken theory as was required. *See Isler*, 305 Minn. at 295, 232 N.W.2d at 821 (affirming jury instruction for “when one undertakes to make an inspection for conditions on land”). And even if UNDAF had a duty to offer protective services at some time, *e.g.* while the trainer was on board, UNDAF was “not required to continue them indefinitely.” Restatement (Second) of Torts § 323 cmt. c.

F. Conclusion on Plaintiffs’ and Estate of Prokop’s Appeal Issues

Imposing a negligence duty on UNDAF here would be inconsistent with the public policies underlying the educational malpractice bar. Given the realities of instruction

generally—and aircraft “transition training” in particular—it would be impossible to articulate UNDAF’s standard of care. And uncertainties about causation were glaring. (See pp. 42-50, *infra*.) Creating a duty here would initiate a flood of litigation against training programs and would burden courts with micromanaging delivery of education. This is particularly true with respect to aircraft passengers such as James Kosak, who had no relationship with UNDAF whatsoever. Finally, permitting Plaintiffs to transform this case into a product-liability case after the verdict would be fundamentally unfair to UNDAF, which—wholly aside from not being sued by either Plaintiff—is not a manufacturer and had neither reason nor opportunity to defend claims at trial as if it were.

“In the end, it is the student who is responsible for his knowledge, including the limits of that knowledge.” *Glorvigen*, 796 N.W.2d at 553 (quoting *Page*, 610 N.W.2d at 906). The rule necessarily applies equally to pilots. See *Lange*, 259 Minn. at 465, 108 N.W.2d at 432 (“pilot in command” is “responsible for his own negligence”); accord 14 C.F.R. § 91.3(a). Prokop was the pilot in command. The injuries did not occur during instruction. UNDAF is a nonprofit educational institution. Public policy bars the claims.

II. UNDAF’S CROSS-REVIEW ARGUMENTS

The Court granted cross-review on two issues raised by UNDAF:

First, that Plaintiffs did not establish a triable issue on causation. There is nothing in this record beyond rank speculation that anything UNDAF did or did not do caused the crash.

Second, that the district court erred by entering judgment in favor of Plaintiffs and against UNDAF. Plaintiffs concede they never asserted wrongful-death claims against

UNDAF. In fact, the record establishes that Plaintiffs expressly disclaimed any intention to hold UNDAF liable, and UNDAF's intervention did not occur until after the statute of limitations had expired on any such claims.

Irrespective of the duty question, the Court should hold that judgment was properly directed in UNDAF's favor on these legal grounds.

A. In the Absence of Any Competent Evidence that Training-Related Negligence Caused the Crash, Judgment in Favor of UNDAF Is Required

1. Standard of Review

When a district court denies JMOL premised on lack of proof of causation, the Court considers the evidence in the light most favorable to the prevailing party, reviews the denial *de novo*, and reverses when there is no competent evidence reasonably tending to sustain the verdict. *Langeslag v. KYMN Inc.*, 664 N.W.2d 860, 864, 869-70 (Minn. 2003).

2. A Speculative Expert Opinion Has No Evidentiary Value

"Inherent uncertainties about causation" are core concerns of the educational malpractice doctrine. *Glorvigen*, 796 N.W.2d at 554. Further, an expert opinion "based on speculation and conjecture has no evidentiary value." *Albert Lea Ice & Fuel Co. v. U.S. Fire Ins. Co.* 239 Minn. 198, 203, 58 N.W.2d 614, 618 (1953); accord *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 347 (5th Cir. 1985) (affirming directed verdict for plane-crash defendant where "only evidentiary support for plaintiff's theory of causation, the testimony of an expert witness, was purely speculative"). "This

rule applies to opinion evidence, even that of the best of experts.” *Albert Lea Ice & Fuel Co.*, 239 Minn. at 203, 58 N.W.2d at 618 (internal citation omitted).

Plaintiff’s causation case was premised on Walters’ expert testimony. Irrespective of Walters’ qualifications, his opinions were based on speculation and conjecture and therefore constituted legally insufficient evidence on which the jury could have based its verdict. Walters admitted that he simply “assumed” Prokop did not know how to use the autopilot. He further conceded he had no idea whether Prokop even tried to use the device. Walters identified several causal factors but never ruled out whether it was a non-UNDAF instructor who, in fact, failed to provide Prokop with decision making “tools.”

Accordingly, the Court should hold the district court erred by submitting claims of training-related negligence to the jury. *Langeslag*, 664 N.W.2d at 864, 870 (ordering judgment where evidence did not sustain causation verdict); *Lubbers v. Anderson*, 539 N.W.2d 398, 402 & n.3 (Minn. 1995) (affirming summary judgment for lack of causation and deeming it “unnecessary for us to decide the issue of whether [defendant] owed a duty”).

3. The Verdict Was Manifestly Against the Entire Evidence Because the Chain of Causation Was Based on Walters’ Speculative Opinions

When the Court reviews the legal sufficiency of causation evidence, the evidence is reviewed in the light most favorable to Plaintiffs and judgment in favor of Defendants is required if the verdict is manifestly against the entire evidence. *Langeslag*, 664 N.W.2d at 864; *see also Gerster v. Wedin*, 294 Minn. 155, 160, 199 N.W.2d 633, 636

(1972) (affirming JNOV where fire investigator did not know what caused fire); *Rochester Wood Specialties, Inc. v. Rions*, 286 Minn. 503, 509, 176 N.W.2d 548, 552 (1970) (affirming JNOV where experts' conclusions were "based on assumptions which were not established by the evidence"); *Huseby v. Carlson*, 306 Minn. 559, 561, 238 N.W.2d 589, 590 (1975) (per curiam) (affirming directed verdict where expert's opinion was "based upon assumptions").

"Proof of a causal connection must be something more than merely consistent with the complainant's theory of the case." *E.H. Renner & Sons, Inc. v. Primus*, 295 Minn. 240, 243, 203 N.W.2d 832, 835 (1973). "Where the entire evidence sustains, with equal justification, two or more inconsistent inferences so that one inference does not reasonably preponderate over the others, the complainant has not sustained the burden of proof on the proposition which alone would entitle him to recover." *Id.*

In such an instance, judgment in favor of the defendant is required because a verdict would be based on "pure speculation and conjecture." *Id.* at 243-44, 203 N.W.2d at 835; *accord Zinnel v. Berghuis Constr. Co.*, 274 N.W.2d 495, 499 (Minn. 1979) ("From the evidence as a whole, it would be conjecture for a jury to find inadequate traffic control devices proximately caused this accident."); *Nat'l Pool Builders, Inc. v. Summit Nat'l Bank*, 281 N.W.2d 181, 185 (Minn. 1979) (holding it "equally justifiable" to find bankruptcy was caused by insolvency and not defendant's refusal to honor check).

Here, Plaintiffs' chain of causation began with Walters' supposition that, because items on the Flight 4A checklist were left unchecked, the "Recovery from VFR into IMC (auto-pilot assisted)" item must not have been addressed at all. (Tr. 258:24-259:16.) But

Walters freely admitted he had no such knowledge. Nevertheless, his belief about Flight 4a, along with his conversations with Prokop's other flight instructor Steven Day and Prokop's friend Patrick Bujold, provided the sole basis for the opinion that Prokop was not "trained for proficiency" on the autopilot. (Tr. 260:1-12.) And that opinion, in turn, was all that supported his speculative testimony that lack of autopilot training caused the crash:

Q: I believe that it was your opinion that Mr. Prokop was not trained to proficiency in the use of the autopilot, correct?

A: That's correct.

Q: Do you have an opinion as to whether that failure was causally related to this crash?

A: I do.

Q: What is that opinion?

UNDAF counsel: Objection, calls for speculation.

Court: Overruled.

A: I do believe that it was causally related to the accident.

Q: Why is that?

A: Had Mr. Prokop been adequately trained in the use of the autopilot, I believe that he would have been able to recover from this situation by using the autopilot and the crash would not have occurred.

(Tr. 273:19-274:14.)

But Walters then admitted the completed checklist for final evaluation Flight 5A had a checkmark indicating autopilot operations *were* taught. As the Court of Appeals noted, the training syllabus contained language making only the final-evaluation flight

maneuvers mandatory. *Glorvigen*, 796 N.W.2d at 553 n.5. Importantly, Walters also conceded he was simply “assuming” Prokop did not know how to use the device:

Q: [T]here is an indication there that as part of the final evaluation they looked at autopilot operations, correct?

A: Correct.

Q: And I think you said, although that shows autopilot operations were taught, it doesn't tell us what was taught, right?

A: Exactly.

Q: And so you're saying that because it doesn't give a full description of what was taught, you can't conclude that Mr. Prokop knew how to use the autopilot?

A: Well, in this situation IMC, flying from VFR into IMC.

Q: Well, I think your actual line was, it doesn't tell you whether he knew how to use the autopilot or whether he didn't you just don't know. Is that a fair statement?

A: That's a fair statement.

Q: So you're assuming that he didn't, right?

A: Based on the flight, I am assuming that, correct.

(Tr. 406:9-407:4 (emphasis added).) Walters then conceded he lacked knowledge about whether Prokop had even tried to use the autopilot:

Q: You have no idea whether he attempted to use it, do you?

A: I don't.

(Tr. 407:13-15.)

**4. Walters' Conclusions Regarding Lack of Autopilot Proficiency
Are Not Legally Sufficient to Support the Jury Verdict**

Three of this Court's decisions resulting from fire investigations—*Gerster v. Wedin*, *Rions v. Rochester Wood Specialties, Inc.*, and *Huseby v. Carlson*—demonstrate why Walters' testimony on causation was legally insufficient to send this claim to the jury. In all three cases, the expert conceded—as did Walters here—that he had speculated and lacked knowledge about what caused the fires. And in all three cases, the trial courts granted judgment as a matter of law even amid some circumstantial evidence tending to support the plaintiffs' theories. The same result should have followed here, in a situation lacking even the barest circumstantial evidence to support Plaintiffs' theory on causation.

In *Gerster*, a careless smoking case, the legally insufficient expert testimony on causation was indistinguishable from that of Walters here. *See Gerster*, 294 Minn. at 159, 199 N.W.2d at 635-36:

Q (on redirect): You indicated in your response to counsel's cross-examination that the exact cause was unknown, am I correct?

A: Right.

Q: You mean by that, that you don't know exactly or precisely what Mr. Wedin did?

A: Right.

Q: All right, your opinion is, however, that the probable cause was smoker's carelessness?

A: Yes.

Q: All right, thank you.

Q: (on recross): Your opinion, Mr. Braun, is that you don't know what caused the fire, isn't that true? You don't know what caused that fire?

* * *

A: No, I don't know.

Q: All right, a possible cause was a cigarette?

A: Right.

Q: Among many possible causes, isn't that right?

A: Yes. I eliminated a lot of the possibilities, but this one I couldn't eliminate.

Q: Some you can't eliminate?

A: Right.

The similarities between this testimony in *Gerster* and Walters' testimony are striking, and the quoted excerpt provided an exemplar for why JMOL was required here. Walters' admission that he had no idea whether Prokop attempted to use the autopilot is indistinguishable from the *Gerster* expert's testimony that "No, I don't know" what caused the fire. As in *Gerster*, lack of survivors made it impossible to know "exactly or precisely" what Prokop did. As in *Gerster*, Walters identified "many possible causes."

But in *Gerster*, there was at least some circumstantial evidence (the decedent's blood-alcohol level, the expert's ruling out of other potential causes) suggesting that careless smoking may have caused the fire. *Id.* at 157, 199 N.W.2d at 634. Here, Walters did not rule out Prokop's prior flight instruction or the weather conditions. As a matter of law, the proof of causation is substantially weaker here than in *Gerster*.

Similarly, in *Rions*, even though three experts blamed a faulty exhaust fan for a fire, this Court affirmed the trial court's grant of JNOV. The Court explained liability "must be based upon inferences reasonably supported by the evidence and not upon speculation based solely on the occurrence of the fire" and characterized the experts' opinions as "based on assumptions which were not established by the evidence." 286 Minn. at 509, 176 N.W.2d at 552. Similarly, here, the mere occurrence of the crash does not evince training-related negligence, and the record as a whole supports neither Walters' assumptions nor his ultimate conclusion that training caused the crash.

The Court's *per curiam* opinion in *Huseby* drives this point home. There, the Court held the trial court had properly directed a defense verdict where a fire warden admitted he did not check the heating system, examine the mattress, talk to tenants, or find evidence of cigarette butts in the room. 306 Minn. at 560, 238 N.W.2d at 590. Similarly, Walters never examined the crash site and conceded there was no way to ascertain whether Prokop tried to use the autopilot. His opinion was "based upon assumptions not established by the evidence." *Id.* at 560-61, N.W.2d at 590 (citing *Rions*, 286 Minn. at 509, 176 N.W.2d at 552; *Gerster*, 294 Minn. at 160, 199 N.W.2d at 636).

B. Having Not Been Sued, UNDAF Cannot Be Held Liable To Either Plaintiff

1. Standard of Review and Summary of Argument

When a jury apportions fault, a district court's order for judgment requires application of Minn. Stat. § 604.02, which is reviewed *de novo*. *K.R. v. Sanford*, 605

N.W.2d 387, 389-90 (Minn. 2000) (reviewing *de novo* applicability of § 604.01). The court also reviews *de novo* whether a statute of limitations bars a claim. *Oganov v. Am. Family Ins. Group*, 767 N.W.2d 21, 24 (Minn. 2009).

In their briefs, Plaintiffs readily concede “Plaintiffs did not sue UNDAF.” (Gartland Br. 27; Glorvigen Br. 36.) Accordingly, even if the Court were to hold that Plaintiffs’ claims survive the educational malpractice bar *and* that the verdict was based on legally sufficient causal proof, the Court should still affirm judgment in favor of UNDAF on grounds Plaintiffs never asserted any claim against UNDAF. Holding otherwise would authorize future end runs around statutes of limitations and discourage nonparties from intervening, in contravention of judicial economy.

2. UNDAF Intervened to Protect Against Indemnity Liability

In 2008, UNDAF intervened as of right pursuant to Minn. R. Civ. P. 24.01⁷ only to protect against indemnity liability to Cirrus. Cirrus had just tendered defense and indemnity to UNDAF. (UNDAF Add. 1-13.) The tender came one week after the federal district court denied Cirrus’ motion for summary judgment on the ground that “Cirrus’ primary business is building and selling airplanes, not training pilots.” (A57.) But UNDAF’s primary business *is* training pilots. For that reason UNDAF intervened to protect its interests amid uncertainties about whether Cirrus could adequately do so.

⁷ Alternatively, UNDAF sought permissive intervention pursuant to Minn. R. Civ. P. 24.02. However, the district court granted intervention as of right, so no issue regarding permissive intervention is before the Court.

UNDAF's Notice of Intervention clearly articulated it sought intervention only to protect against "indemnity liability" to Cirrus. (A71.) No party disputed that basis. To the contrary, before and during the trial Plaintiffs affirmatively represented to the district court they did *not* seek to hold UNDAF liable. (Pre-Trial Tr. of Apr. 20, 2009 107:5-8; Trial Tr. 1717:2-3.) *Compare Avery v. Campbell*, 279 Minn. 383, 386-88, 157 N.W.2d 42, 44-45 (1968) (injured aircraft passenger asserted direct claims against intervenor aircraft owner).

Plaintiffs have never explained why they never asserted claims against UNDAF. Presumably it was an attempt to avoid the educational malpractice bar, the three-year wrongful-death statute of limitations, or both. In any event, it was only after the district court found the bar inapplicable and the jury rendered its verdict that Plaintiffs changed their position and asserted they were entitled to judgment against UNDAF.

3. Intervention Does Not Make an Intervening Defendant Automatically Liable To Named Plaintiffs

Minn. R. Civ. P. 24.01 provides for intervention when the non-party has (1) "an interest relating to the property or transaction which is the subject of the action" and (2) is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *Miller v. Astleford Equip. Co.*, 332 N.W.2d 653, 654-55 (Minn. 1983) (citing Minn. R. Civ. P. 24.01).

All applicants for intervention must submit a Notice of Intervention accompanied by a pleading "setting forth the nature and extent of every claim or defense to which

intervention is sought and the reasons for the claim of entitlement to intervention.” Minn. R. Civ. P. 24.03. An intervening plaintiff, *e.g.*, a potential subrogee, submits a “complaint in intervention.” *Schweich v. Ziegler, Inc.*, 463 N.W.2d 722, 734-35 (Minn. 1990). An intervening defendant submits an “intervener’s [sic] answer.” Form 18, Minn. R. Civ. P. Appx. of Forms. The intervening defendant can only answer claims then existing—in this case, claims *against Cirrus*.

Intervention does not make an intervenor automatically liable for a judgment in favor of named plaintiffs, even if there is a determination adverse to the intervenor’s interests or position. “Minn. R. Civ. P. 24.01 requires merely a claimed interest, not a certain one.” *Miller*, 332 N.W.2d at 654; *see also Minneapolis Star & Trib. Co. v. Schumacher*, 392 N.W.2d 197 (Minn. 1986) (holding Minn. R. Civ. P. 24.01 is proper means for non-party news media to challenge sealing of civil file); *Dairyland Ins. Co. v. Neuman*, 338 N.W.3d 37, 38-39 (Minn. 1983) (insurer intervened as defendant in another insurer’s declaratory judgment action).

This principle is reflected in Minn. R. Civ. P. 24.01’s purpose as well as the 1968 amendment to the rule. Before 1968, intervenors had to establish they would “gain or lose by the *direct legal effect* of the judgment therein whether or not they were a party to the action.” *Sister Elizabeth Kenny Found. v. Nat’l Found.*, 267 Minn. 352, 357-58, 126 N.W.2d 640, 643-44 (1964) (emphasis added). But in 1968, the rule was amended to effectuate a “change in Minnesota law” to parallel an amended Fed. R. Civ. P. 24(a), thereby permitting intervention when direct liability was “possible” but not “necessary.” Minn. R. Civ. P. 24.01 Advisory C’mtte Note.

As Wright & Miller explains, “[i]t has been clear to all courts that the principal purpose of the amendment was to eliminate the old reading that a would-be intervenor *must be legally bound*, and that instead the court is to view the effect on the intervenor’s interest with a practical eye.” 20 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 80 (3d ed. 2004); *see also* 1 David F. Herr & Roger S. Haydock, *Minnesota Practice—Civil Rules Ann.* § 24:3 (4th ed. 2003) (explaining 1968 amendment effected “a substantial liberalization of intervention practice”).

The rule as amended “promotes the efficient and orderly use of judicial resources by allowing persons, who might otherwise have to bring a lawsuit on their own to protect their interests or vindicate their rights, to join an ongoing lawsuit instead.” *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996). The amended rule also lessens the danger a court would rule the non-party should have intervened to avoid *res judicata*. *See, e.g., Kaiser v. N. States Power Co.*, 353 N.W.2d 899, 903 (Minn. 1984).

4. The Pleadings and Plaintiffs’ Statements to the District Court Demonstrate UNDAF Did Not Acquiesce to Liability by Intervening

The record demonstrates UNDAF intervened not to make itself liable to pay judgments to Plaintiffs, but only to protect against potential “indemnity liability” to Cirrus. (A 70-74.) The purpose was consistent with controlling procedure and law. UNDAF had an “interest relating to” the flight-training transaction between Cirrus and Prokop. *Miller*, 332 N.W.2d at 654. Especially given the federal district court’s distinction between aircraft manufacturers and pilot trainers—which increased potential adversity between UNDAF and Cirrus—UNDAF had to intervene in case its interests

were not “adequately represented” by Cirrus. *Id.* at 654-55; Minn. R. Civ. P. 24.01. UNDAF then submitted a Notice of Intervention accompanied by the required intervenor’s answer to claims *against Cirrus*. Minn. R. Civ. P. 24.03. (A 70-87.)

Plaintiffs never opposed UNDAF’s basis for intervention and never asserted claims against UNDAF. Rather, when responding to UNDAF’s pretrial arguments about why the educational malpractice bar was applicable, Plaintiff Glorvigen stated: “UND is an agent of Cirrus. It was Cirrus’ duty and obligation to provide the training, they simply got UND involved as an agent. *As you know, we didn’t sue UND, we sued Cirrus.*” (Pre-Trial Tr. of Apr. 20, 2009 107:5-8 (emphasis added).) As Plaintiff Gartland stated during the jury instruction stage: “it’s important to note that *we only sued Cirrus.*” (Trial Tr. 1717:2-3 (emphasis added).) Only after the district court rejected the educational malpractice defense and the jury returned its verdict did Plaintiffs reverse course.

Similarly, in *Konen Construction Co. v. United States Fidelity & Guarantee Co.*, 382 P.2d 858 (Or. 1963), the intervening defendants submitted an answer but the plaintiff never served an amended complaint on the intervening defendant. *Id.* at 859. With no pleading providing a basis for judgment against the intervenor, the Oregon Supreme Court remanded for a determination of whether judgment could be taken. *Id.* at 860. The court subsequently affirmed the trial court’s determination that the intervenor could not be liable to the plaintiff on grounds the plaintiff “deliberately” decided not to file an amended pleading (apparently to try to recover attorney’s fees from the defendant it did sue). *Konen Constr. Co. v. U.S. Fid. & Guar. Co.*, 401 P.2d 48, 50 (Or. 1965). A similar

circumstance is present here amid Plaintiffs' attempts to recover from Cirrus, a plane manufacturer, irrespective of the educational malpractice bar.

5. The Judgment Against UNDAF Is an Unauthorized End Run Around the Three-Year Wrongful-Death Statute of Limitations

By having the trial court enter judgment in their favor against UNDAF, Plaintiffs accomplished an unprecedented end run around the three-year statute of limitations for wrongful-death claims. Minn. Stat. § 573.02, subd. 1. Prokop and Kosak died in the January 18, 2003 crash (A1-11), so the limitations period expired on January 18, 2006. Cirrus did not tender defense and indemnification to UNDAF until more than two years later, in February 2008; UNDAF did not file its Notice of Intervention until September 2008; and the district court did not approve the intervention until October 2008.

Although UNDAF raised the statute-of-limitations issue immediately after Plaintiffs indicated they would seek judgment against UNDAF,⁸ the district court did not consider the defense. (Gartland Add. 100-08.) But this Court reviews *de novo* whether the statute of limitations would bar the claim. *Oganov*, 767 N.W.2d at 24.

The *only* claim that has been asserted against UNDAF in this case is Cirrus' pending cross-claims for indemnity and contribution. (A95-97.) "[C]ontribution and

⁸ As UNDAF explained in its JMOL motion: "The trial of this case is over, and the three-year statute of limitations for a wrongful death action in Minnesota has long expired. No amendment of the pleadings to include an action directly against UNDAF can be made." (Mem. in Supp. of JMOL at 21.) UNDAF again addressed this issue head-on during the post-trial motion hearing, explaining "the fact is they never sued UNDAF at any time within the applicable statute of limitations, ... and that's why they can't take a judgment directly against us." (Feb. 19, 2010 Post-Trial Mot. Tr. 47:14-48:2.) Counsel for Plaintiffs and the Estate of Prokop have never offered substantive argument in response. (*Id.* 48:34-49:6.)

indemnity are independent causes of action.” *City of Willmar v. Short-Elliott-Hendrickson, Inc.*, 512 N.W.2d 872, 874 (Minn. 1994). A contribution claim accrues only after a party has paid “more than its fair share.” *Id.* An indemnity cause of action is governed by a statute of limitations measured from the time payment is made on an underlying claim, not when an underlying tort was committed. *Metro. Prop. & Cas. Ins. Co. v. Metro. Transit Comm’n*, 538 N.W.2d 692, 696-97 (Minn. 1995).

“[A] statute of limitations defense does not negate liability; it is only a procedural device that is raised after the events giving rise to liability have occurred, and which *precludes the plaintiff from collecting on that liability.*” *City of Willmar*, 512 N.W.2d at 875 (emphasis added). Here, Plaintiffs are precluded from collecting from UNDAF as a matter of law because Plaintiffs did not sue UNDAF within the requisite three-year period. When UNDAF intervened more than two years later, in no way did it envision—or could have been expected to envision—the district court would enter judgment against UNDAF in favor of Plaintiffs.

C. Conclusion on Cross-Review Issues

James Walters’ speculative opinions failed to provide the legally sufficient evidence required to uphold the jury’s verdict. Nor do the jury’s findings provide a legal basis for judgment against UNDAF in favor of Plaintiffs. UNDAF’s alleged indemnity liability remains unresolved, as do issues surrounding interest on the judgment.⁹

⁹ UNDAF and Cirrus have appealed from an amended judgment reflecting the district court’s order that the 10% interest rate of Minn. Stat. § 549.09 (2009) applies to the

Accordingly, the Court should hold Plaintiffs failed to present evidence demonstrating a causal connection between insufficient training and the crash. Alternatively, the Court should hold Plaintiffs cannot take judgment against UNDAF jointly or severally.

CONCLUSION

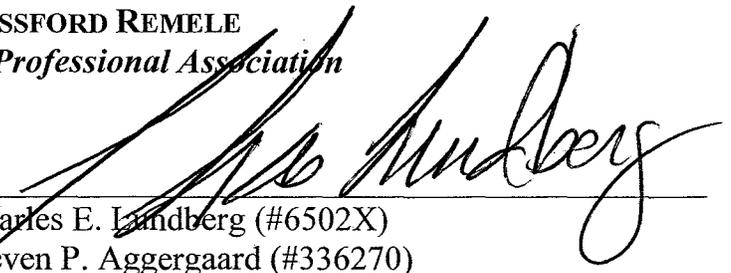
As the court below noted, the difficult circumstances of this case cannot be denied. “We recognize that this case involves the tragic deaths of two men, as well as emotional, physical, and financial losses for their families.” *Glorvigen*, 796 N.W.2d at 557. The majority acknowledged the district court “understandably was troubled” by the required outcome, but that those concerns, “however legitimate, reflect policy considerations and do not provide a basis to withhold application of the educational-malpractice bar.” *Id.*

The Court of Appeals was spot-on. This Court should affirm the decision to confirm that public policy could not have imposed a duty on UNDAF to train Gary Prokop to fail-safe proficiency. Apart from the duty question, the Court should affirm the Court of Appeals’ result on lack-of-causation grounds. Finally, the Court should hold Plaintiffs cannot take judgment from UNDAF, whom Plaintiffs concede they never sued.

judgments. By Order of May 10, 2011, the Court of Appeals stayed those appeals, Nos. A11-777, A11-778, A11-806, and A11-807.

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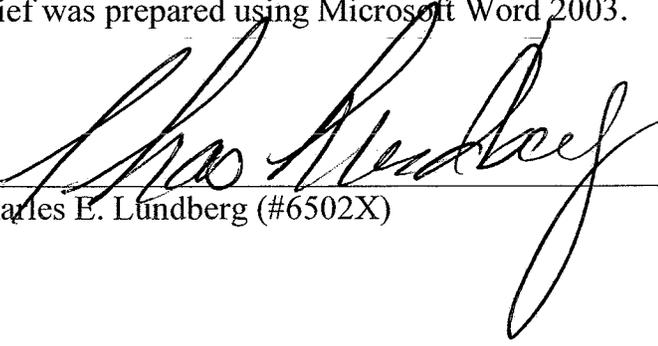
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to Minn. R. Civ. App. P. 132.01, for a brief produced using the following font: Proportional serif font, 13 point or larger. The length of this brief is 14,706 words. This brief was prepared using Microsoft Word 2003.

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